88- 1771

No. _____

Supreme Court, U.S.
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In The

# Supreme Court of the United States

October Term, 1988

JOSEPH A. BONJORNO, LORRAINE KERR, (EXECUTRIX OF THE WILL OF GEORGE M. KERR, JR.), AND BARBARA K. CLISBY,

*Cross-Petitioners,*

v.

KAISER ALUMINUM & CHEMICAL CORPORATION and KAISER ALUMINUM & CHEMICAL SALES, INC.,

*Cross-Respondents.*

## CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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## STATEMENT OF QUESTIONS PRESENTED ON CROSS-PETITION

In an antitrust action to recover treble damages from a monopolist predator that destroyed Plaintiffs' business:

1. Considering:

¶ the extraordinary circumstances of delay, and the diminution in the time value of money suffered by Plaintiffs, (who were the victims of intentional, predatory, monopolistic conduct by Defendants,) and

¶ the benefit obtained by the predatory Defendants from the time value of money they retained,

Did not the Court of Appeals, in awarding interest to Plaintiffs, as the prevailing party, possess inherent equitable power and authority under 28 U.S.C. § 1912 and the second sentence of Fed. R. App. P. 37 to fashion remedies and do justice as between the parties by awarding Plaintiffs interest to cover their actual loss of the time value of money at market rates (i.e., monthly average prime rates, compounded monthly from August 1979 until full payment of all amounts due), which would amount to more than $17 million; and

Did not the Court below err as a matter of law in only awarding interest at the Federal T-bill rate (some 2 to 3 points below prime) pursuant to 28 U.S.C. § 1961, as amended, which would return to Plaintiffs only some $8.3 million or $12 million of interest, depending on how the district court on remand interprets and applies the correct method of calculating interest and setting the interest rate.

2. Should not the award of interest on Plaintiffs' judgment begin to run as of the date liability was fixed in August of 1979—and not as decided by the Court below, as of December 2, 1981 (when the damages were fixed) where:

- ¶ the verdict and judgment as to liability were never disturbed; and
- ¶ that judgment of liability was accompanied by a money judgment in the amount of $5.4 million, which was subsequently increased to $9,567,939 on a re-trial, limited to damages only, that had been requested by the defendants; and
- ¶ the damages awarded by the jury in both damage trials were measured in dollars valued as of May 1977, with no accounting for interest or diminution in the time value of money from August 1979 (the original judgment date) to December 2, 1981 (the verdict date on recalculation of damages).



## STATEMENT PURSUANT TO SUPREME COURT RULE 28.1

Cross-Petitioners Joseph A. Bonjorno, Lorraine Kerr (Executrix of the Will of George M. Kerr, Jr.) and Barbara K. Clisby ("Plaintiffs"), are the former shareholders and trustees in liquidation of the original Plaintiff below: Columbia Metal Culvert Company of Vineland, New Jersey. Pursuant to Supreme Court Rule 28.1, Plaintiffs state that they have no other corporate affiliations.

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## BONJORNO TIME LINE

1972 Kaiser's threat to drive Columbia out of business

1973 Kaiser opens plant near Columbia's plant and hires away Columbia's best salesman, Robert Kennedy

1/7/74 Complaint filed

1974 Price Squeeze

1975 Kaiser's conduct causes Columbia to stop producing pipe

5/2/77 First Trial, Directed Verdict

5/31/77 Cutoff date for damages

5/24/78 Court of Appeals reverses directed verdict and remands for trial

1978 Columbia's plant sold to third party

8/16/79 Trial and Liability Verdict

8/21/79 First Damage Verdict

8/22/79 *Money Judgment Entered $5.4mm

6/17/81 District Court grants new trial on damages

12/2/81 Second Jury Verdict on Damages

12/4/81 *Judgment Entered $9.6mm

1981 Kaiser purchases Columbia's plant

10/1/82 Effective Date of 28 U.S.C. Section 1961 as amended

1/18/83 *District court grants partial NOV, judgment $4.7mm

12/27/84 *Court of Appeals affirms liability, vacates judgment NOV and reinstates $9.6mm damage judgment

6/6/85 Kaiser petition for certiorari

6/23/86 U.S. Supreme Court denies cert. petition

7/1/86 Court of Appeals issues mandate

7/3/86 Kaiser pays $9,567,939 to Plaintiffs

4/11/88 District Court Awards interest $2,632,886

1/9/89 Court of Appeals Judgment Awarding Interest at T-bill ra

1972 1973 1974 1975 1976 1977 1978 1979 1980 1981 1982 1983 1984 1985 1986 1987 1988 1989

*denotes the various "judgments" entered in this case

## OPINIONS BELOW

This complex and protracted treble damage antitrust action has its genesis in a Complaint filed in January 1974.[1] The Judgment and Opinion of the Court of Appeals dated January 9, 1989, awarding interest on the treble damage judgments are reported at 865 F.2d 566, and are reproduced at Pet. A-1 and Pet. A-3, respectively.[2] The Opinion of the United States District Court for the Eastern District of Pennsylvania dated April 11, 1988, is reproduced at Pet. A-31.

This Court has already denied certiorari twice on the substantive issues underlying the interest issues in this case. The Opinion of the Court of Appeals on the merits of the antitrust claim, dated December 27, 1984, is reported at 752 F.2d 802 (*cert. denied*, 477 U.S. 908 (1986)). The Opinions of the District Court on the merits of the antitrust claim are reported at 518 F. Supp. 102 (1981) and 559 F. Supp. 922 (1983). The Opinion of the Court of

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[1] Attached in the Appendix to this Cross-Petition, and reproduced for the convenience of the Court on the opposite page, is a document entitled "Bonjorno Time Line" which succinctly identifies the principal opinions and events in the extraordinary history of this complex and protracted case.

[2] References to the Appendix of Original Petitioners (Kaiser) in No. 88-1595 are set forth as "Pet. A—," while references to the Appendix to this Cross-Petition are set forth as "Cross-Pet A—."

Appeals in an earlier appeal decided on May 24, 1978, is reported at 579 F.2d 20 (*cert. denied,* 439 U.S. 876 (1978)).

———o———

## JURISDICTION

The judgment of the Court of Appeals on postjudgment interest was entered on January 9, 1989. Cross-petitions for rehearing and rehearing *in banc* were denied by Order dated February 13, 1989. Pet. A-29. Circuit Judge Stapleton dissented from denial of rehearing *in banc* for the reason set forth in his dissent to the judgment of the panel. Circuit Judges Becker and Hutchinson dissented from the denial of rehearing *in banc,* but did not specify whether they were disposed in favor of the contentions raised in Plaintiffs' Petition for Rehearing or Kaiser's Petition for Rehearing. Pet. A-30. Kaiser Aluminum & Chemical Corp. and Kaiser Aluminum & Chemical Sales, Inc. ("Kaiser") filed and served a Petition for a Writ of Certiorari on March 30, 1989. No. 88-1595. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Supreme Court Rule 19.5.

Plaintiffs' Counsel received Kaiser's petition for certiorari on March 30, 1989.



## STATUTES INVOLVED

The award of interest in this case involves interpretation of 28 U.S.C. § 1961, as amended effective October 1, 1982, which provides in pertinent part:

> (a) Interest shall be allowed on any money judgment in a civil case recovered in a district court. Execution therefore may be levied by the marshal, in any case where, by the law of the State in which such Court is held, execution may be levied for interest on judgments recovered in the Courts of the State. Such interest shall be calculated from the date of the entry of the judgment, at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment. The Director of the Administrative Office of the United States Courts shall distribute notice of that rate and any changes in it to all Federal judges.
>
> (b) Interest shall be computed daily to the date of payment . . . and shall be compounded annually.

Also relevant to the issues in this Cross-Petition is 28 U.S.C. § 1912, which provides:

> Where a judgment is affirmed by the Supreme Court or a Court of Appeals, the court in its discretion may adjudge to the prevailing party just damages for his delay, and single or double costs.

This case also involves application of the second sentence of Federal Rule of Appellate Procedure 37, titled "Interest on Judgments." The Rule in its entirety provides:

> Unless otherwise provided by law, if a judgment for money in a civil case is affirmed, whatever interest is allowed by law shall be payable from the date the judgment was entered in the District Court. If the judgment is modified, or reversed with a direction that a judgment for money be entered in the District Court, the mandate shall contain instructions with respect to allowance of interest.

———o———

## I. PRELIMINARY STATEMENT

It has been more than fifteen years since Kaiser, a giant monopolist, began its predatory action that ultimately destroyed Plaintiffs' small but successful family business, culminating in the only liability verdict and first damage judgment in August 1979, and the recalculated damage judgment in 1981 of more than $9.5 million.

Plaintiffs are gratified that the Court below repudiated Kaiser's obscene position that it owed only two days interest for a total of $1,223. Similarly, they are gratified that the Court below reversed the district court's award of some $2.6 million based on simple six percent interest under Pennsylvania law.



On the other hand, Plaintiffs regret that the Court of Appeals failed to award them the full measure of market rate interest (some $17 million), which they should recover, just to preserve their damage award against diminution over time; and to force the wrongdoer, Kaiser, to disgorge its ill-gotten, unjust enrichment, at Plaintiffs' expense, in a similar amount.

Notwithstanding their desire to see full justice done, and to carry out the policy set forth in the federal antitrust laws, the Plaintiffs, after more than 15 years of hard-fought litigation, wish to put to an end this seemingly endless dispute so they can get on with their businesses and lives. Thus Plaintiffs are willing to accept the Court of Appeals' decision if they can now promptly and without further litigation enjoy in some measure the benefits to which a jury of their peers determined they were entitled—albeit, benefits significantly reduced because they will not have received full market interest for the full time period after entry of judgment in their favor.

Thus, for the reasons stated in their Brief in Opposition to Kaiser's Petition for Certiorari (filed concurrently with this Cross-Petition), Plaintiffs respectfully request this Court deny Kaiser's Petition for Certiorari. Only if the Court should grant Kaiser's Petition, do Plaintiffs request that the Court grant this Cross-Petition for Certiorari as to the issues presented by Plaintiffs.

This Court should not allow a predatory monopolist to reap the benefits of its monopoly and retain the benefits of 10 years worth of interest on a multi-million-dollar judgment, over a period when interest rates in the private market peaked at prime rates over 20%, and when the Plaintiffs, due to Kaiser's conduct, were forced to borrow money at three percentage points above the prime rate. Kaiser's intentional predatory conduct in destroying Plaintiffs' family business is the most egregious and reprehensible type of conduct prohibited by the antitrust laws. By arguing for an inadequate rate and time period of postjudgment interest, Kaiser seeks to pay off the entire $9.5 million judgment out of the $17 million profit it has earned (at Plaintiffs' expense) from the use of Plaintiffs' money, and still turn a handsome profit from its conduct, notwithstanding the condemnation of that conduct by the jury and the Courts.

The Plaintiffs file this Cross-Petition for Certiorari to preserve their right to present argument to this Court on:

(1) the failure of the Court below to recognize the power and legal authority to award in this unusual case monthly average prime rates compounded monthly—rather than the T-bill rate under 28 U.S.C. § 1961, which is historically several points below prime, and which only establishes the minimum interest for routine judgments in the District Court that do not involve, as in this case, long and protracted appeals; and

(2) the wrongful denial by the Court of Appeals of almost 2½ years interest on the judgment, which was first entered against Kaiser in August 1979.



The undisputed facts summarized below demonstrate the rightness and justice of Plaintiffs' claim:

¶ Kaiser, which the jury found to have intentionally and willfully monopolized the market for fabricated aluminum culvert pipe, engaged in systematic predatory conduct which destroyed Plaintiffs' family business. By delaying its ultimate day of reckoning in having to pay its full liability on the judgment, Kaiser, the predatory monopolist, has reaped the benefits of delay, according to market rates, in an amount in excess of $17 million.

¶ Similarly, during this same period, the Plaintiffs (who were not awarded any prejudgment interest) were deprived of the full value of the benefit of their judgment of liability from August 1979 to date by a similar amount—in excess of $17 million.

¶ The Court should not allow the foregoing inequity go unremedied.

———o———

## II. STATEMENT OF THE CASE

### A. Kaiser's Predatory Destruction Of Plaintiffs' Business And Monopolization Of The Market For Fabricated Aluminum Culvert Pipe

On the merits of the underlying dispute, Kaiser, a large international corporation, was found liable for deliberately destroying Plaintiffs' relatively small competing business, Columbia Metal Culvert Co., Inc. ("Columbia"). 752 F.2d 802. *See* Bonjorno Time Line, Cross-Pet. A-1. In January 1974, Columbia filed its Complaint to seek re-

dress under the antitrust laws. By May 1977, when this case originally went to trial, Kaiser had effectively driven Columbia out of business. The first trial in 1977 resulted in a directed verdict in favor of Kaiser, which was reversed by the Court of Appeals, holding that Plaintiffs presented proper evidence showing intentional, predatory conduct in violation of the antitrust laws. *Columbia Metal Culvert Co., Inc. v. Kaiser Aluminum & Chemical Corp.*, 579 F.2d 20, 31 (3d Cir. 1978). This Court denied Kaiser's Petition for certiorari. *Kaiser Aluminum & Chemical Corp. v. Columbia Metal Culvert Co., Inc.*, 439 U.S. 876 (1978).

In August 1979, in a retrial on remand, the jury found that Kaiser monopolized the market for fabricated aluminum culvert pipe, and destroyed Plaintiffs' business. On August 22, 1979, a judgment was entered in favor of Plaintiffs and against Kaiser in the trebled amount of $5,445,000. After waiting almost two years before ruling on Kaiser's post-trial motions, the District Court denied Kaiser's Motion for a Judgment Notwithstanding the Verdict, affirmed the liability finding, but granted Kaiser's alternative request for a new trial limited to damages only. 518 F. Supp. 102 (E.D. Pa. 1981).

On December 2, 1981, the jury rendered its verdict in the retrial on damages, which was based on the facts as determined by the first jury in 1979. Notwithstanding Plaintiffs' counsel's request on December 2, 1981 that judgment be entered forthwith on the verdict amount trebled, the District Court waited two days before entering judgment in the trebled amount of $9,567,939. Although the 1981 jury awarded higher damages than the 1979 jury,



there was no increase in the amount of damages at the second trial to account for the time value of money between the original August 1979 judgment and the subsequent December 1981 judgment. Plaintiffs' proof as to damages in both trials was based on valuations as of May 1977.

After waiting more than another year to decide Kaiser's post-trial motions following the 1981 trial, the District Court on January 17, 1983 granted, in part, Kaiser's Motion for Judgment Notwithstanding the Verdict, reduced the amount of the judgment from $9,567,939 to $4,651,560, and entered a final appealable judgment. On cross-appeals, after almost two year's delay, the Third Circuit reinstated the full judgment in the amount of $9,567,939. *Bonjorno v. Kaiser Aluminum & Chemical Corp.*, 752 F.2d 802 (3d Cir. 1984). This Court denied Kaiser's petition for certiorari. *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 477 U.S. 908 (1986).

After the parties stipulated that the District Court should consider the issue of the appropriate amount of interest in the first instance, the Court of Appeals issued its mandate on July 1, 1986, and Kaiser paid Plaintiffs $9,567,939 on July 3, 1986.

### B. Kaiser Has Obtained The Benefits Of Delay, And The Value Of Plaintiffs' Judgment Has Been Severely Diminished Due To Loss Of The Time Value Of Money

Plaintiffs' damages were valued as of May 31, 1977. *See* 559 F. Supp. at 930-38. Plaintiffs did everything in their power to bring this case to trial promptly, but through

no fault of Plaintiffs, they were not able to obtain a judgment in their favor against Kaiser until the second trial in August 1979.[3]

The District Court delayed for nearly two years before deciding Kaiser's post-trial motions, thereby delaying the Plaintiffs' recovery. Ultimately on the retrial on damages in 1981, the 1981 jury emphatically reaffirmed the result reached by the first jury in August 1979, granting even higher damages than the 1979 jury had awarded.

Kaiser sought to benefit from this delay, by its contention that Plaintiffs were not entitled to any interest over the period of delay caused by Kaiser's own post-trial motions. The liability finding by the jury in August 1979, and liability judgment entered on that finding, have never been altered by the District Court, the Court of Appeals or this Court, and formed the basis for the damages ultimately assessed.

On December 2, 1981, the jury fixed Plaintiffs' damages at an amount that was trebled to $9,567,939, based upon calculations of damages made as of May 1977. There is no increment in the amount of damages assessed in 1981 to account for the time delay or the time value of money from August 1979 through December 1981. Accordingly, Plaintiffs should be entitled to postjudgment interest over that period. *See Handguards, Inc. v. Ethi-*

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[3] Kaiser was able to convince the District Court, incorrectly, to grant a directed verdict in 1977, which was reversed in the 1978 appeal to the Third Circuit. *Columbia Metal*, 579 F.2d at 31; *see also Columbia Metal Culvert Co. v. Kaiser Industries Corp.*, 526 F.2d 724 (3d Cir. 1975) (pretrial jurisdictional appeal).



*con, Inc.*, 743 F.2d 1282, 1299-1300 (9th Cir. 1984), *cert. denied*, 469 U.S. 1190 (1985).

Moreover, the time over which Kaiser delayed its ultimate day of reckoning was a time of abnormally high interest rates, with the prime rate peaking over 20% during the relevant period. Measured at monthly average prime rates, compounded monthly, interest on $9,567,939 from August 1979 through the date of the briefs filed with the Court of Appeals (June 13, 1988) accounting for Kaiser's payment of $9,567,939 on July 3, 1986, would result in interest due as of that date of an amount in excess of $17 million, with interest continuing to accrue at a rate of approximately $4,250 per day. Kaiser, as a predatory monopolist, should not be permitted to retain any portion of the windfall benefits it received by delay in collection of the judgment.

### C. The Judgment Of The Court Of Appeals

In determining the appropriate interest on Plaintiffs' judgment on the merits, the Court of Appeals:

(1) denied as " without merit,"[4] Plaintiffs' request that interest be calculated at monthly average

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[4] The Court of Appeals rejected Plaintiffs' position on this issue in one sentence with no discussion:

> We have considered Bonjorno's argument that a "market rate" of interest should apply; however, we find the argument to be without merit.

865 F.2d at 572, n.10, Pet. A-14 n.11 From the Court of Appeals discussion of 28 U.S.C. § 1961, rejection of Plaintiffs' argument must have been based on the Court of Appeals' perception that it lacked the power to make such an award, and felt bound by the provisions of the federal interest statute, 28 U.S.C. § 1961, which by its terms applies to district court judgments.

prime rates, compounded monthly, from August 1979, which would have resulted in an award of interest in excess of $17 million;

(2) denied Plaintiffs' request that interest should date back to August 1979, and instead held that interest should begin to run as of December 2, 1981, the date of the verdict on the retrial on damages;

(3) rejected Kaiser's contention that interest should only run from the date of issuance of the Court of Appeals mandate on July 1, 1986, reinstating the jury's December 2, 1981 damage award;

(4) rejected, without comment, Kaiser's contention that postjudgment interest should accrue only on pre-trebled damages, rather than the amount of the judgment;

(5) held that, on the narrow facts of this case, application of current law, which has now been in effect for over six years, does not result in manifest injustice, and therefore the amount of interest is determined by the current version of 28 U.S.C. § 1961, rather than the version repealed by Congress over six years ago.

Thus, the Court of Appeals denied Plaintiffs interest over the period between the first judgment and the second judgment, which effectively took away from the injured Plaintiffs, and granted to the predatory monopolist, the benefit of 2-½ years interest on a multimillion dollar judgment. The Court of Appeals denial of 2-½ years interest was contrary to precedent in a number of other Circuits and even contrary to precedent within its own court.

The Court of Appeals also denied Plaintiffs' request for interest at market rates that would accurately measure the time value of money, apparently on the basis that it



was constrained by the rate set forth in 28 U.S.C. § 1961 for calculation of interest by the clerk's office in execution on district court judgments in run-of-the-mill cases. This Court should reaffirm the power of the Court of Appeals under 28 U.S.C. § 1915 and Fed. R. App. P. 37 to do justice as between the parties and fashion equitable remedies for awards of interest that will prevent diminution in the value of judgments inherent in the appeals process, and to award market interest in exceptional cases such as the present one.

Accordingly, Plaintiffs respectfully request that this Court grant their Cross-Petition, in the event it grants certiorari on Kaiser's Petition.

—o—

## III. REASONS FOR GRANTING PLAINTIFFS' CROSS-PETITION

### Summary

¶ Plaintiffs have unjustly been denied almost two and a half years of interest, and have been denied full market rate interest, while Defendant (the wrongdoer, monopolist predator that destroyed Plaintiff's small family business) has been unjustly enriched by an amount equal to Plaintiffs' loss.

¶ It is contrary to public policy, as clearly articulated by the Congress in fashioning the antitrust laws, that a monopolist predator, as the undisputed wrongdoer, should be able to avoid paying market rate interest for the entire period and avoid paying any interest at all for two and a half years, to the wronged party on a damage award, particularly where the delay was caused by Defen-

dants' post trial motions and the lower court's delay in ruling on Defendants' motions.

¶ This Court should reaffirm that interest runs from the date liability is fixed and the first damage judgment is entered—not from the date of recalculation of damages without accounting for delay. Furthermore, any doubt as to which rule to follow should be resolved in favor of the wronged, and against the adjudicated wrongdoer, whose conduct caused the uncertainty. *See Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 265 (1946).

¶ This Court should reaffirm the power of the Courts of Appeals to award interest on its judgments at market rates sufficient to preserve the value of the award against diminution due to loss of the time value of money.

### 1. The Equities In This Case And Policy Considerations Underlying Interest Awards Require That Plaintiff Receive Full Market Rates

The basic purpose of court-awarded interest is to preserve the value of the judgment against diminution due to loss in the time value of money. *See* Note, *Interest on Judgments in the Federal Courts*, 64 YALE L.J. 1019 (1955).[5] The innocent plaintiff should not suffer a di-

[5] In 1873, this Court held that "the creditor is entitled to interest . . . by way of compensation for the delay in payment." *Young v. Godbe*, 82 U.S. 562, 565 (1873); *see also United States v. United Drill & Tool Corp.*, 183 F.2d 998, 999 (D.C. Cir. 1950) ("in equity interest is allowed as a means of compensating a creditor for loss of use in his money"). *See generally* S. Homer, *A History of Interest Rates* (2d Ed. 1977); *Marshall v. Beeler*, 104 Kan. 32, 178 P. 245, 246 (1919) (discussing interest in the courts).



minution in the value of the judgment due to loss of the time value of money while the wrongdoing defendant delays payment by pursuing postjudgment relief in the courts. Moreover, the wrongdoing defendant should not be entitled to retain the benefits of the time value of money over the period of delay from entry of the original judgment until ultimate collection of the amounts due.

The foregoing policy concerns are particularly important in the present case, in which Kaiser engaged in intentional predatory conduct destroying Plaintiffs' family business. *See Columbia Metal*, 579 F.2d at 31. The policies of the antitrust law and the policies behind court-awarded interest coincide in the case at bar to mandate a full award of interest sufficient to preserve the value of the judgment.

The Court of Appeals erred in failing to recognize its power and carry out its duty to award interest at full market rates to preserve the value of the judgment against diminution due to loss of the time value of money. Specifically, the Court erred in holding that Plaintiffs' interest award must be based solely on 28 U.S.C. § 1961, which merely establishes the minimum amount of interest required on all district court judgments and provides an easy method for the district court clerk's office to calculate interest to allow parties to execute on the judgment amount plus interest. By improperly treating the minimum interest mandated by 28 U.S.C. § 1961 as a maximum limit on the interest award, the court below ignored its larger duty to do justice between the parties and to preserve the value of the judgment.

In the present case, interest on the judgment for the full period amounts to more than $17 million. This is the measure of Kaiser's gain through delay, and the corresponding true loss to the Plaintiffs.

Market rate interest is an accurate measure of the diminution in the value of the judgment. By contending that it is only liable for two days of interest, Kaiser is attempting to effectively de-treble the treble damage award in the present case. Rather than paying the judgment amount ($9.5 million) plus market interest ($17 million) which totals almost $27 million, Kaiser seeks to pay only the judgment amount, which is approximately 1/3 of the total of the judgment amount plus market interest. That inequity should not be tolerated. This Court should reaffirm the power of the Court of Appeals to fully preserve the value of the judgment by awarding market interest in exceptional cases such as the present one.

### 2. The Courts Have Authority To Preserve The Value Of A Judgment By Awarding Interest At Full Market Rates

As we demonstrate below, where the final decision of a lower court is delayed because of the appeal process, the Court of Appeals has the inherent equitable power to award sufficient interest to preserve the value of the judgment, regardless of the minimum interest mandated by 28 U.S.C. § 1961. Moreover, the Court of Appeals' inherent equitable power to award adequate and full market rate interest was codified as early as the Judiciary Act of 1789, which empowered the Supreme Court and Circuit Courts to award "just damages for . . . delay" upon affirmance of a judgment or decree. Judiciary Act of 1789,



ch. 20, Sec. 23, 1 Stat. 73, 85 (current version codified at 28 U.S.C. § 1912). Federal Rule of Appellate Procedure 37, adopted in 1968, also explicitly grants the Courts of Appeals discretion and power to award sufficient interest to preserve the value of the judgment.

In *National Bank of Commerce of New York v. Mechanics National Bank,* 94 U.S. 437, 439 (1876), this Court recognized the equitable power of the courts to award interest under equitable principles beyond the specific interest mandated under a strict reading of 28 U.S.C. § 1961. This Court has long recognized the courts' power to award interest based on sources other than 28 U.S.C. § 1961. *See Perkins v. Fourniquet,* 55 U.S. (14 How.) 328, 330-34 (1853); *Mitchell v. Harmony,* 54 U.S. (13 How.) 115, 147-49 (1851); *Boyce's Executioners v. Grundy,* 34 U.S. (9 Pet.) 275, 289 (1835).

In *Perkins v. Fourniquet,* the Court held that Fourniquet was entitled to interest over the period the case was on appeal to the Supreme Court as determined by the Supreme Court pursuant to this Court's Rules adopted under section 23 of the Judiciary Act of 1789, rather than interest as provided under state law incorporated for district and circuit court judgments under the former version of 28 U.S.C. § 1961—the act of 1842.[6]

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[6] In *Perkins,* this Court stated:

> The act of 1842 [predecessor to 28 U.S.C. § 1961] does not embrace cases in equity; nor does it extend to either judgments or decrees, in this court. It is confined, in plain terms, to judgments at law, in the circuit and district courts. . . . Upon common-law prin-

(Continued on following page)

The act of 1842, as currently amended and codified in 28 U.S.C. § 1961, applies by its terms only to judgments "in a district court." By contrast, interest on cases before the Courts of Appeals is governed by the current codification of section 23 of the Judiciary Act of 1789 at 28 U.S.C. § 1912, and by Federal Rule of Appellate Procedure 37, adopted in 1968. These provisions wisely give the Courts of Appeals discretion in setting the appropriate interest awards in cases appealed to those courts. This discretionary power coexists with and supplements the power to award minimum interest pursuant to 28 U.S.C. § 1961. *See Brock v. Richardson,* 812 F.2d 121 (3d Cir. 1987) (equitable power to award postjudgment interest); *see also Smith v. National Railroad Passenger Corp.,* 856 F.2d 467 (2d Cir. 1988) (adoption of Fed. R. App. P. 37 grants power to award interest for period prior to issuance of mandate and supersedes contrary caselaw).

Although Courts of Appeals have generally been guided by the interest provisions of 28 U.S.C. § 1961 in

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(Continued from previous page)

> ciples a judgment does not carry interest. It is true, that damages may be recovered for the detention of the debt, in an action on the judgment. But previous to the act of 1842, neither interest nor damages, for the detention of the debt, could have been levied under process of execution, upon the judgment of a circuit or district court of the United States.
>
> *But the act of 1842, does not speak of interest or damages upon the judgments of this court,* nor does it repeal the 23d section of the act of 1789 [predecessor to 28 U.S.C. 1912]. This section provides, that when a judgmet or decree is affirmed here, this court is directed to adjudge or decree to the respondent in error, just damages for his delay, and single or double costs, at their discretion.

55 U.S. (14 How.) at 331 (emphasis added).



determining the time period and the rate of interest, they, quite properly, have not felt constrained to limit interest awards to the minimum amount of interest mandated by that statute. Instead, they have generally employed equitable principles in determining the appropriate amount of interest in any given case in order adequately to preserve the value of the judgment against diminution due to loss in the time value of money. *See, e.g., Poleto v. Consolidated Rail Corp.,* 826 F.2d 1270 (3d Cir. 1987); *Turner v. Japan Lines, Ltd.,* 702 F.2d 752 (9th Cir. 1983); *Louisiana & Ark. Ry. Co. v. Pratt,* 142 F.2d 847 (5th Cir. 1944).

Although the Courts of Appeals generally have employed equitable principles to *extend the time period* of the interest award beyond the specific time established by a narrow reading of the statute, some courts have also exercised equitable discretion in setting the *rate of interest,* notwithstanding the rate specified in 28 U.S.C. § 1961.[7]

Moreover, even the Court of Appeals for the Third Circuit has recognized the court's discretion to set an adequate postjudgment interest rate, where the court's equitable power rather than 28 U.S.C. § 1961 forms the basis for the award of postjudgment interest. *Brock v. Richardson,* 812 F.2d 121, 126 (3d Cir. 1987); *cf. Devex Corp.*

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[7] For example, in *Northern Natural Gas Co. v. Hegler,* 818 F.2d 730, 738 (10th Cir. 1987), the Court of Appeals affirmed the District Court's exercise of discretion in setting reasonable rates for postjudgment interest following entry of the original judgment and remand on appeal, stating:

> It is apparent that commercial rates increased greatly during this period and the trial court had discretion to keep the rates *in accordance with the real world.* (emphasis supplied).

*v. General Motors Corp.*, 749 F.2d 1020, 1024 (3d Cir. 1984), *cert. denied*, 474 U.S. 819 (1985) (applying higher rate in amended Delaware law, notwithstanding contrary declaration by Delaware legislature, in order to advance "the policy underlying 28 U.S.C. § 1961: compensation of the wronged party for loss of the use of money, in a changing economy . . . [reflecting] changes in the value of the use of money"); *Peterson v. Crown Financial Corp.*, 661 F.2d 287 (3d Cir. 1981) (prejudgment interest at market rates); *Phoenix Canada Oil Co. v. Texaco, Inc.*, 842 F.2d 1466, 1479-80 (3d Cir.) (prejudgment interest), *cert. denied*, 109 S.Ct. 273 (1988); *Green v. USX Corp.*, 843 F.2d 1511, 1530 & n.16 (3d Cir. 1988) (prejudgment interest).

In sum:

1. The Court of Appeals has the power to award sufficient interest to preserve the value of the judgment.

2. If the minimum interest mandated under 28 U.S.C. § 1961 does not satisfy that goal, the court may, and in this case respectfully should, award market rate interest sufficient to preserve the value of the judgment.

3. The Plaintiffs have been denied the full benefits of market rate interest, which has resulted in serious diminution in the value of their judgment.

4. The Court should not allow this inequity to go unremedied, particularly in light of Kaiser's egregious intentional, predatory conduct destroying Plaintiff's business, and the measurement of Plaintiffs' damages in 1977 dollars.

Accordingly, Plaintiffs request that if certiorari is granted on Kaiser's petition, this Cross-Petition also



should be granted to clairfy the power of the Court of Appeals to award market interest sufficient to preserve the value of the judgment against diminution due to loss in the time value of money, notwithstanding the minimum interest mandated under 28 U.S.C. § 1961.

### 3. It Is Against Public Policy To Encourage Appeals And Delay In Litigation Where The Losing Party Can Still Profit From Use Of The Winner's Money At Rates Considerably Below The Losing Party's Cost Of Money

Unless the Court reaffirms the power of the federal courts to award full market interest in exceptional cases such as the present case, litigants may be encouraged to go out of their way to relitigate issues on post-trial motions and on appeals and petitions for certiorari, simply to receive the benefit of the time value of money. Congress was concerned with the problem of discouraging unwarranted appeals when it amended 28 U.S.C. § 1961 in 1982 to abolish the divergent and inadequate state law rates of interest applicable under the earlier version of the statute. *See* S. Rep. No. 97-275, 97th Cong. 2d Sess. 11, *reprinted in* 1982 U.S. Code Cong. & Admin. News 11, 21:

> Under current law, the interest rate on judgments in the Federal courts is based on varying State laws and frequently falls below the contemporary cost of money. Part B of Title III sets a realistic and nationally uniform rate of interest on judgments in the Federal courts that would be keyed to the *prime interest rate* as determined by the Internal Revenue Service. *This eliminates an economic incentive which exists today for a losing defendant to appeal a judgment and accumulate interest on the judgment award at the commercial rate during the pendency of the appeal.* (emphasis added).

Although the original proposal for amendment of 28 U.S.C. § 1961 provided for interest at prime rate on all cases, the provision was changed to the federal T-bill rate, at the request of the then Budget Director David Stockman, who requested on behalf of the United States that the postjudgment interest rate not exceed the cost of money of the federal government. *See Campbell v. United States,* 809 F.2d 563, 574-75 (9th Cir. 1987) (discussing Stockman's request to modify proposed rate). The cost of money for private parties, however, is measured by prime interest rates, and the policy concerns noted in the Senate report mandate recognition of that fact in exceptional cases such as the present case.

By failing to award interest back to the original judgment in August 1979, and failing to award interest at market rates, the Court of Appeals' decision allows Kaiser to profit by its post-trial motions, even though it ultimately and repeatedly lost before the jury, the district court and the Court of Appeals. This result is contrary to public policy in that it unduly encourages parties to relitigate issues through post-trial motions and appeals.

### 4. Plaintiffs Were Improperly Denied 2½ Years Of Interest

#### (a) Postjudgment Interest Runs From The Date Of The Original Judgment Establishing Liability And Calculating Damages Unless Subsequent Recalculation Of Damages Accounts For The Time Value Of Money After That Date

The Third Circuit's holding denying interest between the original judgment of August 1979 and the retrial on



damages in December 1981 is plainly in error and contrary to legal principles recognized by many other courts. Plaintiffs' damages were valued as of May 31, 1977. At a bare minimum, they should be entitled to postjudgment interest at least from the August 22, 1979 judgment in their favor.

*The General Rule*

In *Handguards, Inc. v. Ethicon, Inc.,* 743 F.2d 1282, 1299-1300 (9th Cir. 1984), *cert. denied,* 469 U.S. 1190 (1985), the Ninth Circuit upheld a District Court award of postjudgment interest in an antitrust case for the period between an original judgment and a new judgment on retrial on damages, in circumstances similar to those in the present case.[8] The Ninth Circuit held:

> Where . . . [interest for the period between two judgments] has not been included in damages, it can be recovered as postjudgment interest.

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[8] The Ninth Circuit affirmed the District Court's award of postjudgment interest on the lower principal amount of the first judgment, with the principal amount stepped up to the higher amount of the subsequent judgment as of the date of its entry. *See Handguards, Inc. v. Ethicon, Inc.,* 552 F. Supp. 820, 821-22 (N.D. Cal. 1982), *aff'd,* 743 F.2d 1282 (9th Cir. 1984), *cert. denied,* 469 U.S. 1190 (1985).

A similar step-up of principal was endorsed by the Sixth Circuit in *Bailey v. Chattem, Inc.,* 838 F.2d 149, 154 (6th Cir. 1988), *cert. denied,* 108 S. Ct. 2831 (1988).

A number of courts, however, hold that interest runs from the date of the original judgment on the principal amount subsequently established. *See, e.g., Institutionalized Juveniles v. Secretary of Public Welfare,* 758 F.2d 897, 927 (3d Cir. 1985); *Copper Liquor, Inc. v. Adolph Coors Co.,* 701 F.2d 542 (5th Cir. 1983) (*en banc*); *United States v. Michael Schiavone & Sons, Inc.,* 450 F.2d 875 (1st Cir. 1971); *Mascuilli v. United States,* 383 F. Supp. 50 (E.D. Pa. 1974), *aff'd without opinion,* 519 F.2d 1398 (3d Cir. 1975).

743 F.2d at 1299-1300. In the present case, like *Handguards,* the increased amount of the judgment on retrial was not the result of any accounting for the time value of money between the dates of the two judgments. In both the 1979 trial and the 1981 damage trial, Plaintiffs' theory of damages remained the same: the damages were valued as of May 1977. *Compare* 559 F. Supp. at 930-38 (1981 damage trial), *with* 518 F. Supp. at 120-21 (1979 damage trial).

Moreover, the Ninth Circuit in allowing postjudgment interest to commence as of the date of the original judgment followed the majority rule which allows a prevailing plaintiff "postjudgment interest from the date of *the original judgment* in his favor." *Chattem, Inc. v. Bailey,* 108 S. Ct. 2831, 2832 (White, J., dissenting from denial of certiorari) (emphasis added). Thus, notwithstanding subsequent recalculation of damages as in the present case, most circuits allow interest to date back to the original judgment calculating the amount of damages.[9]

Although the Court of Appeals properly held that interest commenced running earlier than issuance of the Court of Appeals' mandate on July 1, 1986, it erred in failing to award interest back to August 22, 1979 (when the original judgment was entered in favor of Plaintiffs

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9 As discussed in Plaintiffs' Brief in Opposition to Kaiser's Petition for Certiorari, the Courts of Appeals appear to be unanimous in endorsing the equity of the statute in interpreting 28 U.S.C. § 1961 to allow commencement of the running of interest on the judgment from the date of the original judgment in the District Court, rather than the entry of judgment following remand after issuance of the appellate court mandate. See Brief in Opposition to Kaiser's Petition for Certiorari, No. 88-1595, at 27-28.



in the district court). Where there are multiple judgments recalculating damages, all based on a single undisturbed liability finding and judgment, postjudgment interest should run from the date of the original calculation of damages—as long as any subsequent calculations of damages do not account for the time value of money after the date of the original judgment. This is the general rule stated by the Ninth Circuit in *Handguards,* and this rule best carries out the policy behind the federal interest statute to preserve the value of the judgment against diminution due to loss of the time value of money.

At least two decisions of this Court also have affirmed the allowance of interest on the judgment from the date of original judgments, notwithstanding subsequent reductions in the amount of such judgments. *De La Rama v. De La Rama,* 241 U.S. 154, 159-60 (1916); *Kneeland v. American Loan and Trust Co.,* 138 U.S. 509 (1891).

As the District Court in *Handguards* noted, there is no reason why this well accepted rule should not be extended to cases recalculating the damage which result in an increase in the damage amount. *Handguards, Inc. v. Ethicon, Inc.,* 552 F. Supp. 820, 821-22 (N.D. Cal. 1982), *aff'd,* 743 F.2d 1282 (9th Cir. 1984), *cert. denied,* 469 U.S. 1190 (1985); *see also Twin City Sportservice, Inc. v. Charles O. Finley & Co.,* 676 F.2d 1291, 1310 (9th Cir.), *cert. denied,* 459 U.S. 1009 (1982); *Mt. Hood Stages, Inc. v. Greyhound Corp.,* 616 F.2d 394, 406 (9th Cir.), *cert. denied,* 449 U.S. 831 (1980).

*Third Circuit Precedent And Error*

The Third Circuit's denial of interest back to August 22, 1979 in the present case is inexplicably inconsistent with governing precedent even within the Third Circuit:

¶ In *Institutionalized Juveniles v. Secretary of Public Welfare*, 758 F.2d 897, 927 (3d Cir. 1985), the Third Circuit remanded a fee award for recalculation, but held that interest on that award under 28 U.S.C. § 1961 should be calculated on the amount of the award ultimately established on remand, with interest beginning to run *from the date of the original award* below, not from the date of the recalculation. *Id.* at 927.

¶ Similarly, in the present case, interest should properly be awarded from the original judgment in favor of Plaintiffs on August 22, 1979, not on the date of recalculation of damages on December 2, 1981.

¶ *See also Mascuilli v. United States*, 383 F. Supp. 50 (E.D. Pa. 1974) (postjudgment interest runs from June 25, 1968 judgment on liability and damages, notwithstanding subsequent vacation of damage portion of the judgment and recalculation of damages), *aff'd without opinion*, 519 F.2d 1398 (3d Cir. 1975).

The Court of Appeals' stated reasons for distinguishing *Institutionalized Juveniles* and *Handguards* from the present case are without substance. The Court below suggested that the present case was different from *Institutionalized Juveniles* because that case involved the court's "modifying a judgment." 865 F.2d at 571 n.6, Pet. A-12 n.7. The court in *Institutionalized Juveniles*, however, did not simply "modify" the district court judgment. The judgment was "vacated in part, and the case remanded for further proceedings." 758 F.2d at 927. In the further proceedings the district court was directed to recalculate the fee award and then grant "postjudgment interest . . . on the amount of the recalculated award *from the date of its original order* awarding the fee." *Id.* (emphasis added). Similarly, in the present case, interest should run on the recalculated judgment amount from the date of the original judgment in favor of Plaintiffs.



The court below attempted to distinguish *Handguards* by describing that case as "holding that plaintiff is entitled only to postjudgment interest from the date of the first judgment to the date of the second judgment because the claim was not liquidated until the first judgment." 865 F.2d at 571 n.6, Pet. A-12 n.7.

¶ *First*, the Third Circuit was incorrect to the extent it suggested the court in *Handguards* limited the plaintiff in that case to interest over the period between the two judgments. There was no dispute that plaintiff *was entitled* to interest after the second judgment. *See Handguards*, 743 F.2d at 1298.

¶ *Second*, the Ninth Circuit in *Handguards* specifically held that the plaintiff *was entitled* to postjudgment interest over the period between the first and second judgments, just as Plaintiffs in the present case are reqesting interest between the first and second judgments in their favor. *Id.* at 1299-1300 & n.28.

**(b) Decisions Of The First, Fifth, Sixth, Eighth, Tenth And Federal Circuits Are In Accord With The Ninth Circuit *Handguards* Rule**

An examination of the cases in the various circuits reveals conformity of the opinions to the general rule set

forth by the Ninth Circuit in *Handguards*: Postjudgment interest should be awarded from the date of the original judgment establishing liability and calculating damages, unless there is some accounting for the time value of money after that date in a subsequent recalculation of the amount of damages. This general rule comports with the policy behind 28 U.S.C. § 1961 to preserve the value of the judgment against diminution due to loss of the time value of money. It insures justice between the parties by preserving the value of the judgment entered in favor of the innocent and wronged plaintiff, and disgorges the windfall benefit that would otherwise result in favor of the wrongdoing defendant. These principles are particularly important in the present case, which involves intentional predatory monopolization and intentional destruction of a family business by a large international corporation, and in which damages were measured in 1977 dollars.

Moreover, although other circuits have not stated the generally applicable rule as concisely and clearly as the Ninth Circuit in *Handguards*, an examination of the leading cases from other circuits reveals that the Ninth Circuit approach is the general governing standard among the various circuits in determining when interest begins to run where there are multiple recalculations of the amount of damages.[10]

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10 1st Cir.: *United States v. Michael Schiavone & Sons, Inc.*, 450 F.2d 875, 876-77 (1st Cir. 1971) (interest should run from the original liability judgment of June 30, 1969—even though the damages assessed on that date had been vacated and subsequently recalculated).

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The Court of Appeals' decision denying almost 2½ years interest by failing to award interest back to August 22, 1979, is at odds with the foregoing precedent and conflicts with the basic policy behind the federal interest statute and the federal antitrust laws.

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5th Cir.: *Copper Liquor, Inc. v. Adolph Coors Co.*, 701 F.2d 542 (5th Cir. 1983) (en banc) (fee award should bear postjudgment interest on the increased amount of $244,687.50 from the date of the original award of $45,000).

6th Cir.: *Bailey v. Chattem, Inc.*, 838 F.2d 149 (6th Cir. 1988) (interest should run from October 27, 1980 judgment, despite an intervening appeal which had vacated the compensatory damage assessment and remanded for retrial of those damages), *cert. denied*, 108 S. Ct. 2831 (1988).

8th Cir.: *Total Petroleum, Inc. v. Davis*, 822 F.2d 734 (8th Cir. 1987) (postjudgment interest should run from date of original judgment but on principal amount ultimately determined later after resolution of amount of set off).

Fed. Cir.: *Mathis v. Spears*, 857 F.2d 749, 760 (Fed. Cir. 1988) ("Interest on an attorney fee award thus runs from the date of the judgment establishing the right to the award, not the date of the judgment establishing its quantum.").

10th Cir.: *Compare Northern Natural Gas Co. v. Hegler*, 818 F.2d 730, 737-38 (10th Cir. 1987) (postjudgment interest should commence as of the original judgment in 1974, despite reversal and recalculation of damages, where the difference between the first and second judgment did not go to any basic issues of liability, but merely was a matter of recalculating damages), *cert. dismissed*, 109 U.S. 28 (1988), *with FDIC v. Rocket Oil Co.*, 865 F.2d 1158, 1161-62 (10th Cir. 1989) (where original judgment was reversed on basic liability issues—there had never been any verdict or judgment in favor of plaintiff until the reversal on appeal—postjudgment interest should not run from the date of a District Court judgment in favor of the defendant that was reversed on appeal).

## IV. CONCLUSION

For the reasons stated above, and in Plaintiffs' Brief in Opposition to Kaiser's Petition for Certiorari, Plaintiffs respectfully request that Kaiser's petition be denied. If Kaiser's petition is granted, respectfully, the Court should also grant the instant cross-petition to consider all of the interrelated interest issues decided by the Third Circuit.

Respectfully submitted,

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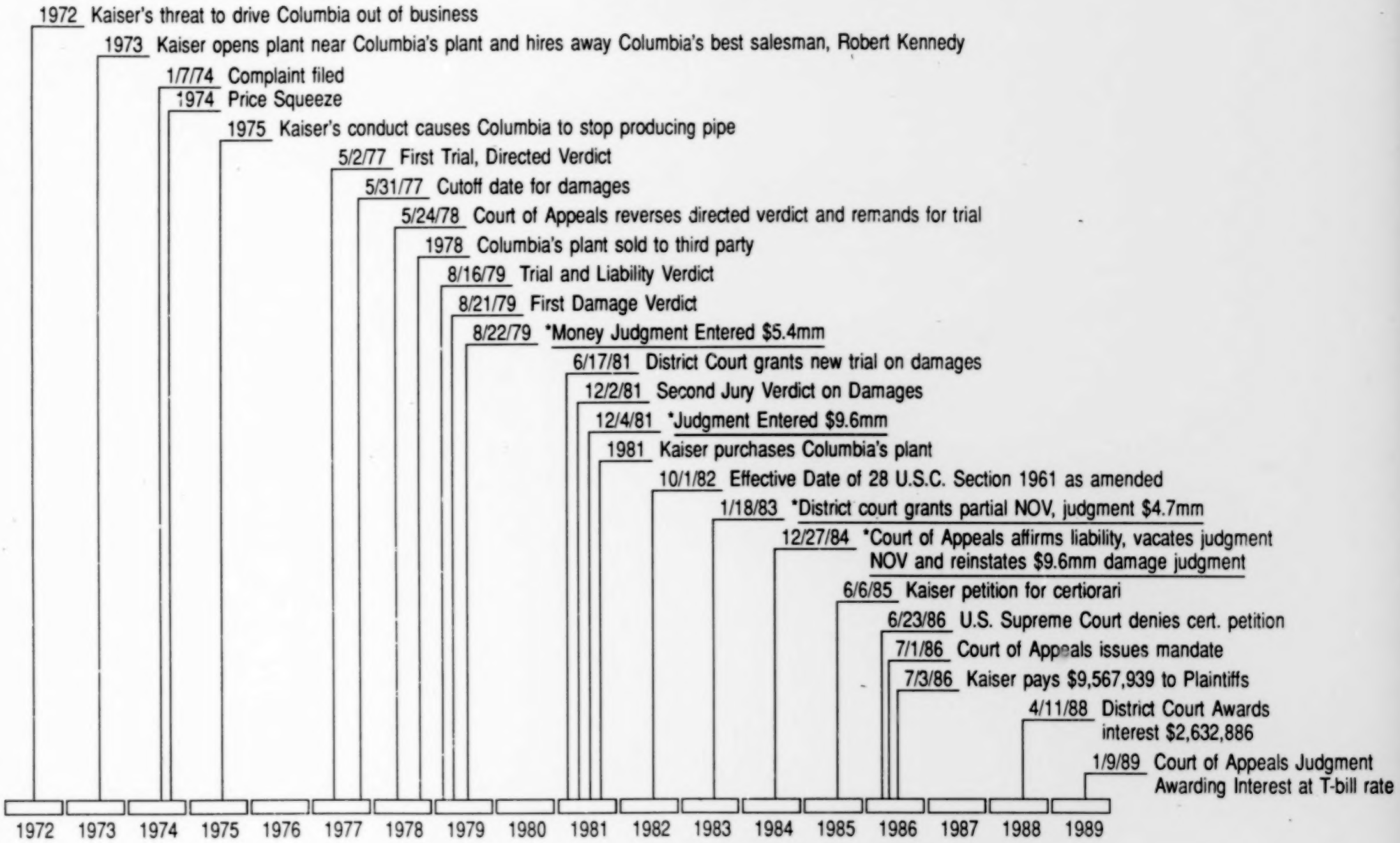
## APPENDIX

## BONJORNO TIME LINE


1972 Kaiser's threat to drive Columbia out of business
1973 Kaiser opens plant near Columbia's plant and hires away Columbia's best salesman, Robert Kennedy
1/7/74 Complaint filed
1974 Price Squeeze
1975 Kaiser's conduct causes Columbia to stop producing pipe
5/2/77 First Trial, Directed Verdict
5/31/77 Cutoff date for damages
5/24/78 Court of Appeals reverses directed verdict and remands for trial
1978 Columbia's plant sold to third party
8/16/79 Trial and Liability Verdict
8/21/79 First Damage Verdict
8/22/79 *Money Judgment Entered $5.4mm
6/17/81 District Court grants new trial on damages
12/2/81 Second Jury Verdict on Damages
12/4/81 *Judgment Entered $9.6mm
1981 Kaiser purchases Columbia's plant
10/1/82 Effective Date of 28 U.S.C. Section 1961 as amended
1/18/83 *District court grants partial NOV, judgment $4.7mm
12/27/84 *Court of Appeals affirms liability, vacates judgment NOV and reinstates $9.6mm damage judgment
6/6/85 Kaiser petition for certiorari
6/23/86 U.S. Supreme Court denies cert. petition
7/1/86 Court of Appeals issues mandate
7/3/86 Kaiser pays $9,567,939 to Plaintiffs
4/11/88 District Court Awards interest $2,632,886
1/9/89 Court of Appeals Judgment Awarding Interest at T-bill rate
1972 1973 1974 1975 1976 1977 1978 1979 1980 1981 1982 1983 1984 1985 1986 1987 1988 1989

*denotes the various "judgments" entered in this case